

**Ase K. Sand**  
National Contact Point for Responsible Business Conduct, Norway (NCP)  
Postboks 8114  
0032 Oslo  
Norway

07 February 2020

### **Complaint to the NCP: Martin Linge Project Crane Accident (the Complaint)**

Thank you for your email of 16 January 2020 and your invitation to provide additional comments prior to your Initial Assessment, further to those set out in our letter of 5 December 2019. We set out below our comments in response to each of the bullet points in your email, which we have numbered for ease of reference:

#### **1. Whether the Norwegian NCP is the correct entity to assess the Complaint**

We do not seek to question the competence of the NCP to handle this specific instance and thank you for your willingness to offer your good offices. However, given that: there is a separate specific instance pending before the Korean NCP which relates to substantially the same issues; and the Korean NCP is likely better placed to understand the relevance of applicable law and procedures associated with the pending Korean litigation (as to which see our comments on bullet point 5, below), we should be grateful if you would explain why it is considered necessary to have parallel specific instances before the Korean and Norwegian NCPs.

#### **2. The identity of the party concerned and its interest in the matter**

The identity of the complainants and their interest in the matter is sufficiently clear.

#### **3. Whether the Complaint is material and substantiated**

According to the Norwegian Procedural Guidelines:

*“A complaint must be substantiated in order for the NCP to assess whether it merits further consideration. The complainant is requested to substantiate the case with facts as far as possible. It is preferable to include copies of original documents/first-hand accounts rather than describing such documentation. The case must also be material and concern an issue covered by the Guidelines.”*

The Complaint concerns issues which are undoubtedly material and within the scope of the OECD Guidelines. In no way do we seek to minimise the gravity of the incident or deny the public interest in learning from it to prevent future harms.

The comments which we make in response to this bullet point relate to the specific allegations of wrongdoing by Equinor as set out at pp. 17 and 18 of the Complaint. In this respect, we would respectfully submit that the Complaint does not meet the thresholds for materiality and/or substantiation set out in the OECD Guidelines.

With respect to disclosure, the Complaint alleges that our failure to disclose documents relating to the accident is a breach of Chapter III of the Guidelines of sufficient materiality to warrant further examination.

As you are of course aware, the OECD Guidelines rest on the fundamental principle that: **“Obeying domestic laws is the first obligation of enterprises. The Guidelines are not a substitute for nor should they be considered to override domestic law and regulation. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in situations where it faces conflicting requirements. However, in countries where domestic laws and regulations conflict with the principles and standards of the Guidelines, enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law.”**<sup>1</sup>

This, fundamental principle should be read to underpin and qualify the norms set out in the remainder of the Guidelines. Accordingly, where an enterprise cannot make a disclosure without breaching domestic law, our understanding is that the Guidelines do not require it to do so. Any failure to disclose in these circumstances cannot, therefore, amount to an issue within the scope of the OECD Guidelines, still less one which is sufficiently material to merit further examination by the NCP. Indeed, to proceed with a specific instance beyond the Initial Assessment stage in such circumstances would place an enterprise in a position in which it was required, unnecessarily, to face conflicting requirements and this would run contrary to the letter and spirit of the Guidelines.

As we sought to explain in our letter of 5 December 2019, Equinor is, as a matter of Norwegian law, bound by confidentiality obligations in the applicable contracts. We have since checked and confirmed this position with independent outside counsel. Their legal opinion is attached hereto. Accordingly, we reiterate that we cannot disclose any of the documents which the Complainants request and which we have in our possession without committing an actionable breach of contract under Norwegian law.

Accordingly, with respect to the Disclosure Chapter we respectfully submit that the Complaint does not raise an issue with respect to Equinor which is within the scope of the Guidelines, still less an issue which is sufficiently material to merit further examination. We would be required to take the same position were the Complaint against Equinor to proceed to dialogue/mediation or further examination by the NCP and so would ask that this issue be determined now, at the Initial Assessment stage.

The Complaint further alleges that Equinor failed to adhere to various articles of the Guidelines relating to general policies and human rights due diligence. However, this section of the Complaint comprises only of a list of references to Articles in the Guidelines. Contrary to the relevant provisions of the Norwegian Practical Guidance set out above, the Complaint does not describe how Equinor failed to adhere to these principles, still less refer to any original documents or first-hand accounts relevant to our alleged wrongdoing. In the circumstances, it is not possible for us to ascertain what it is said that we should have done differently. We would therefore repeat our respectful submission

---

<sup>1</sup> Chapter I “Concepts and Principles”, Article II [OECD Guidelines for Multinational Enterprises](#)

that the Complaint against Equinor in this respect is insufficiently substantiated to merit further examination.

**4. Whether there is a link between the activities of the company subject to the Complaint and the issue raised in the specific instance**

At the time of the accident, Equinor held a minority share in the joint venture. Equinor was not the operator, was not in charge of the contractual relationship with the relevant contractors and did not control the relevant conditions of work at the yard where the accident occurred.

**5. The relevance of applicable law and procedures, including court rulings**

As you are aware, the accident is the subject of ongoing litigation in the Korean courts. Equinor does not take the position that this, parallel, litigation precludes examination by the NCP of issues arising out of the accident. However, as set out at Comment 26 of the Procedural Guidance to the Guidelines (emphasis added):

**“NCPs should evaluate whether an offer of good offices could make a positive contribution to the resolution of the issues raised and would not create serious prejudice for either of the parties involved in these other proceedings or cause a contempt of court situation. In making such an evaluation, NCPs could take into account practice among other NCPs and, where appropriate, consult with the institutions in which the parallel proceeding is being or could be conducted. Parties should also assist NCPs in their consideration of these matters by providing relevant information on the parallel proceedings.”**

In light of this Guidance, we should be grateful if you would clarify how it is anticipated that the offer of good offices by the NCP, in addition to the Korean NCP and parallel litigation, will make a positive contribution to the resolution of the issues raised in the Complaint.

As to whether a further examination of the issues by the NCP could create “serious prejudice for either of the parties involved or cause a contempt of court situation”, these are questions which must be addressed to the parties to the Korean litigation in light of applicable Korean law. As Equinor is not a party to the Korean litigation, it is unable to comment.

Mindful of the expectation that we assist the NCP with consideration of these matters by “providing relevant information on the parallel proceedings”, we have made enquiries about the status of proceedings but have been unable to obtain any detailed or specific information save that we understand that a judgment is expected in the first half of 2020. As Samsung Heavy Industries is a party to the Korean proceedings, we kindly request that any requests for information about the incident or the Korean proceedings by a competent NCP be directed to it.

**6. How similar issues have been or are being handled in other domestic or international proceedings**

In seeking to address this criterion and support the NCP with its Initial Assessment, we have carried out research into how other NCPs have addressed similar issues to those which are raised in the Complaint against Equinor. Unfortunately, we were unable to find any material which would be of particular use to the NCP in its Initial Assessment.

**7. Whether the consideration of the specific instance would contribute to the purposes and effectiveness of the Guidelines**

As set out under bullet point 3 (above), we consider that proceeding with a Complaint against Equinor for a failure to disclose documents which it is prohibited from disclosing under applicable domestic law would be contrary to the purpose and effectiveness of the Guidelines. We also consider that allegations that Equinor failed to adhere to various articles relating to general policies and human rights due diligence are, contrary to the requirements of the Guidelines, insufficiently substantiated to merit further examination.

We would invite you to take the aforementioned into account in determining whether the Complaint against Equinor merits further assessment. We reiterate our thanks for the opportunity to provide further comments at this stage. We are of course available to discuss any of the issues arising in this letter or the specific instance more broadly.

Yours sincerely,



Anders Opedal

Equinor ASA



# Legal Opinion

To: Equinor ASA  
From: Advokatfirmaet Wiersholm AS  
Subject: Disclosure of information to the Norwegian National Contact Point  
Date: 6 February 2020

## Disclosure of information to the Norwegian National Contact Point

### 1. Introduction and executive summary

Advokatfirmaet Wiersholm AS ("**Wiersholm**") has been asked to consider whether Equinor ASA ("**Equinor**") can disclose certain documents, concerning a work accident, to the Norwegian National Contact Point ("**Norwegian NCP**").

The backdrop of the case is the Martin Linge Unit on the Norwegian Continental Shelf – an unitized area comprising of the following production licences: PL 040, PL 043 and PL 043 BS. The unit is licensed to an unincorporated joint venture established in accordance with the Norwegian Petroleum Act and regulated by a joint venture agreement (the "**Hild Unit Agreement**"). At the time of the accident the members of the Unit Joint Venture were Total E&P Norge ("**TEPN**") with a 51% interest, Equinor Energy AS with a 19 % interest and Petoro AS with the last 30%.

TEPN as the operator of the Unit negotiated a contract on the construction of the topsides for fixed combined production and living quarter platform (the "**Platform**") with Samsung Heavy Industries Co Ltd. ("**SHI**"), Technip Norge AS and Technip France S.A.S ("**Technip**") in 2012. The contract (the "**Building Contract**") was signed 20 December 2012 and contained confidentiality obligations on all parties.

The Platform was built in order to extract oil and gas in the unitized area Martin Linge on the Norwegian Continental Shelf, where TEPN was operator.<sup>1</sup> During the construction of the Platform, at SHI's yard in Geoje in South Korea, a work accident took place on 1 May 2017 and led to the fatality of six persons and serious injuries to others. A police investigation took effect immediately after the accident and charges were brought against several persons in SHI's management. According to the provided information, the court of first instance in South Korea gave a judgement in favour of the defendants, and the judgement is appealed and not yet finally decided upon by the appellate court.

On 27 November 2017, TEPN and Equinor entered into an agreement on the assignment of the participating shares of TEPN in the Martine Linge unit, as well as other units on the Norwegian Continental Shelf (the "**Agreement**")<sup>2</sup>. Accordingly, Equinor was assigned all rights, obligations and entitlements concerning Martin Linge unit and became the operator of Martin Linge unit. Furthermore, the Agreement entails that all rights and obligations regarding the construction of the Platform is assigned to Equinor,<sup>3</sup> which subsequently gained access to documents produced in response to the incident.

The Samsung Heavy Industries Martin Linge Project Crane Accident Workers Support Team ("**Workers Support Team**") and the Korean Transnational Corporations Watch ("**TCW**") have currently filed a joint complaint to the National Contact Points in France, Korea and Norway against SHI, Technip, TEPN and

<sup>1</sup> The unit is licensed to an incorporation joint venture between Equinor, Total E&P Norge AS ("**TEPN**") and Petoro AS. TEPN acted, until March 2018, as operator of Martin Linge in accordance with Section 3-7 of the Norwegian Petroleum Act. TEPN's participating interest was assigned to Equinor in March 2018, which then became the new operator.

<sup>2</sup> Agreement between Total E&P Norge As and Statoil Petroleum AS regarding assignment of a participating interest in PL 040, PL 043, PL 043 BS and Martine Linge Unit and PL 554, PL 554B and PL 554C on the Norwegian Continental Shelf.

<sup>3</sup> Attachment 1 to the Agreement.

Equinor, and specifically asked the different entities to disclose certain documents relating to the incident to the respective National Contact points. The Norwegian NCP has requested that Equinor collaborates and disclose relevant information.

Wiersholm's conclusion is that Equinor is bound by extensive confidential obligations that prevent it lawfully from producing any documents produced in response to the incident to the Norwegian NCP. The Agreement between Equinor and TEPN includes confidentiality clauses, which prohibit the disclosure of information received in connection with the Agreement, including any documents produced in response to the incident. No exception to such an obligation is available to Equinor. Furthermore, also the Hild Unit Agreement have a confidentiality clause that prohibits all members of the Unit to inform third parties or make public any documents concerning activities under the Agreement. Finally, the Building Contract contains strict confidentiality provisions on the parties.

## **2. Documents produced in response to the incident may not be disclosed to the Norwegian NCP**

### **2.1 Introduction – the complaint**

The Worker Support Team and the TCW have filed a joint complaint to the French, Korean and Norwegian National Contact Point for the OECD Guidelines for Multinational Enterprises. The complainants ask, among other, that Equinor discloses certain documents related to the incident. The complainants hold that Equinor, as the current operator of the Martin Linge project, has a duty to identify the cause of the accident and the liabilities of the relevant entities, and therefore must disclose any related documents. Further, the complainants states that Equinor has a duty to disclose the information in compliance with the OECD Guidelines for Multinational Enterprises ("**OECD Guidelines**").

### **2.2 The various contracts and agreements prohibits disclosure of documents produced in response to the investigation**

The Agreement between Equinor and TEPN on the assignment of the participating shares in Martin Linge, governs the right and obligations between the parties, including Equinor's right to disclose information obtained in connection with the Agreement.

Particularly, the Agreement sets forth that *Confidential Information* may not be disclosed to third parties; see the Agreement section 11.1. Confidential Information is "all commercial, technical and other information and data which is either directly or indirectly and in whatever form, disclosed to a Party by the other Party pursuant to and subject to this Agreement"; the Agreement section section 1.11.

To the extent that any documents produced in response to the incident were delivered to Equinor in connection with the Agreement between TEPN and Equinor, when Equinor became operator at the Martin Linge unit and contains any "commercial, technical and other information", such documents will be within the scope of this provision and subject to a strict obligation of non-disclosure on Equinor.

However, the Agreement allows for disclosure of Confidential Information, if such information is required by a "*governmental authority exercising its statutory right to require the same and to such competent authorities, court or any relevant stock exchange where pursuant to applicable law, order, decree or regulation there is a requirement to disclose information, which is binding for the Party or its Affiliates*"; see the Agreement section 11.1 litra c) iii).

Whether the Norwegian NCP constitutes a "*governmental authority*" in relation to the Agreement, depend on an interpretation of the Agreement.

The Agreement is governed by Norwegian law,<sup>4</sup> thus Norwegian principles for interpretation apply. Accordingly, regard must be had to the wording of the Agreement, as well as the context and purpose of the agreement, when deciding whether the Norwegian NCP is a *governmental authority*.

The wording of the Agreement clearly states that only "*governmental authorities*", exercising a "*statutory right*" to require disclosure, have the right to obtain access to Confidential Information.

---

<sup>4</sup> The Agreement section 23.1.

Thus, both the character of the Norwegian NCP and the regulatory framework, within which the Norwegian NCP operates, must be assessed in order to determine whether it is a *governmental authority* pursuant to the Agreement.

The Terms of Reference for the Norwegian NCP, prepared by the Norwegian Ministry of Foreign Affairs, stipulates that the Norwegian NCP is established as an impartial, independent public body that gives legal and non-binding advice in accordance with the OECD Guidelines.<sup>5</sup> The Norwegian Ministry of Foreign Affairs and the Ministry of Trade, Industry and Fisheries appoint the members of the Norwegian NCP on the basis of recommendations from business, trade unions and civil society organizations. The fact that the Norwegian NCP is independent from the Government, and does not employ officials, indicates that it is not a governmental authority.

As to the framework governing the functions of the Norwegian NCP, the OECD Guidelines provide that the Norwegian NCP has as their mandate to (i) promote the OECD Guidelines, (ii) provide advice and guidance on the OECD Guidelines, (iii) ensure that the OECD system and NCP function optimally, (iv) handle complaints relating to the OECD Guidelines, and (v) participate in a process of dialogue and mediation.<sup>6</sup>

There are no laws or regulations providing that the Norwegian NCP has the right to obtain information from any party subject to a complaint concerning the OECD Guidelines. Certainly, the OECD Guidelines stipulates an obligation for enterprises to disclose timely and accurate information on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This disclosure obligation must, however, take "*due regard [to] business confidentiality*".<sup>7</sup> The OECD Guidelines does thus not provide for the disclosure of confidential information. -

Conversely, inter alia courts or the stock exchange, may exercise a statutory right to require disclosure of information in accordance with e.g. the Civil Procedure Act section 21-3 and the Security Trading Act, section 5-12. Such governmental authorities are especially mentioned in the confidentiality clause as governmental authorities, which may require the disclosure of Confidential Information. The context of the text of the Agreement supports that the Norwegian NCP is fundamentally different from authorities, which may require disclosure pursuant to the Agreement, consequently supporting that the Norwegian NCP cannot be regarded as a *governmental authority*.

Thus, the wording and the context of the Agreement provide that the Norwegian NCP is not a *governmental authority* and, furthermore, there are no laws or regulations providing that the Norwegian NCP has the right to obtain information from any party.

The Agreement with TEPN stipulates a clear obligation of confidentiality in regard to all information, obtained in relation to the Agreement, such as any documents produced in relation to the accident. None of the exceptions to the confidentiality obligations apply in this case. Accordingly, Equinor has an obligation to contain any documents produced in response to the incident in accordance with their confidentiality obligations. Therefore, the confidentiality clauses in the Agreement prohibits the disclosure of any documents produced in response to the incident to the Norwegian NCP.

Furthermore, also the Hild Unit Agreement have a confidentiality clause that prohibits all members of the Unit to inform third parties or make public any documents concerning activities under the Agreement. We do not discuss such clause and its effects in addition to what follows from the Agreement with TEPN.

Finally, also the Building Contract contains a strict confidentiality clause on the parties which includes Equinor in particular when Equinor became operator at the Martin Linge unit. The confidentiality clause covers confidential information, specific data listed as such and also mutually agreed confidentiality obligations agreed thereafter. Documents produced in relation to the accident is covered by such a confidentiality clause.

In total, it follows from the Agreement, the Hild Unit Agreement and the Building Contract that Equinor is prohibited to disclose any documents produced in response to the incident to the Norwegian NCP.

<sup>5</sup> Terms of Reference for Norway's national Contact Point for Responsible Business Conduct, page 1.

<sup>6</sup> OECD Guidelines for Multinational Enterprises 2011 Edition © OECD 2011, III Disclosure, page 68 et seq., and the Terms of Reference for Norway's national Contact Point for Responsible Business Conduct, page 2.

**3. Conclusion**

Wiersholm's conclusion is that Equinor is bound by extensive confidentiality obligations, pursuant to which any document produced by the parties in response to the incident cannot lawfully be disclosed.



Stephan L. Jervell

